

WILLIAM M. HENKEL

WILLIAM HENKEL, UNITED STATES MARSHAL, ET AL, FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DE LAURENCE WOOD,
JAMES PARKER,
EDWARD LINDSAY,

Of Counsel for Appellants

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 341.

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| WILLIAM H. McALISTER, Appellant, | } | BRIEF FOR APPELLANT. |
| AGAINST | | |
| WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, | | |
| Respondent. | | |

Statement of the Case.

This is an appeal from a final order of the United States Circuit Court for the Southern District of New York, entered June 14, 1905, denying the appellant's application for a writ of *habeas corpus* (Rec. pp. 29-30), whereby he sought to secure his release from custody under a warrant of commitment issued by the same Court on that day pursuant to an order adjudging him guilty of contempt.

It appears by the petition (Record, pp. 1-4) and the accompanying exhibits that on June 14, 1905, the petitioner, who is a director and the secretary of the American Tobacco Company, a New Jersey

corporation (p. 1), presented himself before the Grand Jury for the Southern District of New York in obedience to what purported to be a writ of *subpœna duces tecum* issued out of the Circuit Court for the same District on the previous day, under the seal of the Court, signed by the Clerk, and bearing *teste* of the Chief Justice of the United States (pp. 10-11), commanding him to lay aside all business and excuses and appear and attend before that body.

"to testify and give evidence in a certain suit or proceeding now pending undetermined in the Circuit Court of the United States for the Southern District of New York, before the Grand Jury thereof, between the United States of America, as complainant, and the American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants, on the part of the United States";

and further commanding him to bring with him and produce at the time and place aforesaid

"(1.) An agreement, bearing date September 27th, 1902, between Ogden's, Limited, of the first part; the American Tobacco Company, of the second part; the Continental Tobacco Company, of the third part; American Cigar Company, of the fourth part; Consolidated Tobacco Company, of the fifth part; British Tobacco Company, Limited, of the sixth part; and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the seventh part; a copy, or a duplicate original, of the said agreement being on file or recorded in the companies' registration office, in London, England.

(2.) An agreement providing for the transfer, to a separate company, of the export business from the United Kingdom (except to the United States) not only of Ogden's, Limited, but also of the Imperial Tobacco Company (of Great Britain and Ireland), Limited, and of Salmon & Gluckstein, Limited, and the export business, from the United States, of the American Tobacco Company,

the Continental Tobacco Company and the American Cigar Company (except to the United Kingdom), which agreement is referred to in the said last-mentioned agreement of September 27, 1902, as having been then already prepared and executed contemporaneously therewith.

(3.) An agreement, dated September 27, 1902, between the Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the first part; Ogden's, Limited, of the second part; the American Tobacco Company, of the third part; the Continental Tobacco Company, of the fourth part; American Cigar Company, of the fifth part; Consolidated Tobacco Company, of the sixth part, and Williamson Whitehead Fuller and James Inskip, of the seventh part."

The subpoena gave the petitioner notice that for a failure to attend, he would be "deemed guilty of a contempt of Court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit TWO HUNDRED AND FIFTY DOLLARS in addition thereto" (p. 11).

Before being sworn the petitioner asked to be advised what the "suit or proceeding" was, which was thus described in the subpoena, its nature and purpose, and the specific charge against the defendants, if any had been made, in order that he might learn whether or not the Grand Jury had any lawful right or authority to examine him as a witness; and he also asked that he be furnished with a copy of the complaint, information, or proposed bill of indictment, if any, upon which the Grand Jury was acting, so that he might know concerning what transactions, matters or things he was called upon to testify or produce evidence (pp. 11-12).

In reply one of the assistant United States attorneys, in attendance before the Grand Jury, addressed him as follows (p. 12):

"Mr. McAlister, this is a suit or proceeding now pending before the Grand Jury, upon a

complaint and charge made, in behalf of the United States of America, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, under the so-called 'Sherman Act,' being 'An act to protect trade and commerce against unlawful restraints and monopolies.' Under Chapter 755 of the Laws of the United States of 1903, approved February 25th, 1903, no person may be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, in any proceeding, suit or prosecution under the said 'Sherman Act,' under which this suit or proceedings is brought; provided, however, that no person so testifying shall be exempted from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose of the United States Government not to prosecute you, or subject you to any penalty or forfeiture, on account of anything that you may testify to, or on account of any evidence, documentary or otherwise, which you may produce in this proceeding; and that I offer you, and assure you, immunity and exemption from any such evidence, either documentary or otherwise, that you may give."

The witness thereupon asked for an opportunity to consult counsel before being sworn or subjected to examination; and protested against being sworn on the ground that there was no legal warrant or authority for his examination (p. 12).

He was nevertheless sworn and the Assistant United States Attorney proceeded to interrogate him. Having given his residence and stated that he was the secretary and a director of the American Tobacco Company, he was asked (*Id.*):

(1.) What business is the American Tobacco Company engaged in?

To which he replied:

"I respectfully decline to answer any further questions, on the ground, first; that

there is no legal warrant or authority for my examination; second, that my answers may tend to criminate me; and, third, that my answers may tend to furnish evidence against the American Tobacco Company, of which I am secretary, and which is one of the defendants against which this investigation is directed, and that the Government, in this manner, is attempting to compel the American Tobacco Company to be a witness against itself in a criminal case."

He was then asked the following questions, each of which he declined to answer for the same reasons (pp. 12-13):

(2.) Where is the main office of the American Tobacco Company?

(3.) Where is its office in the City of New York?

(4.) Who are the officers of the American Tobacco Company?

Being asked whether he had produced the papers called for by the subpoena, he answered (p. 13):

"I have not, because, as I am advised by counsel, I am under no legal obligation to do so; second, because they may tend to criminate me; and, third, because they are not my property, but that of the American Tobacco Company, and are in my custody solely by reason of my official relations toward that company. Under these circumstances, my counsel advise me that the compulsion of the subpoena would, if effective, amount to an unreasonable search for and seizure of the company's papers and effects, in violation of its rights under the Constitution, which it is my duty to protect by all lawful means, as I am now doing. I am further advised by my counsel that the subpoena, which is, in effect, a warrant to search for and seize the papers in question, was not issued upon probable cause, or supported by oath or affirmation, and is, for that reason, utterly null and void."

He further stated that he had not produced any of the papers or documents, and that he declined to produce them for the reasons already given (*Id.*).

After this he was further questioned as follows:

(5.) Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in tobacco products, cigars and cigarettes, between this country and Great Britain, and any of its colonies (*Id.*, 13)?

(6.) Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in tobacco, tobacco products, cigars and cigarettes between the several States of the United States (*Id.* 13-14)?

(7.) Were you present, in England, when an agreement in writing, dated September 27, 1902, was executed between Ogden's, Limited, the American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, British Tobacco Company, Limited, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, on or about the day of its date?

(8.) Is the paper which I now show you (see Exhibit C, pp. 14-24) a copy of the agreement which was then executed?

(9.) Is Exhibit C, now shown you a copy of one of the papers or documents which you are required by the *subpoena duces tecum*, above referred to, to produce before this Grand Jury?

(10.) Is there an agreement, of which Exhibit C is a copy, now in force (*Id.*, 14)?

The witness declined to answer any of these questions assigning the same reasons given for his previous refusal to testify (*Id.*).

At this point the inquiry was suspended, and the Grand Jury filed in open court a presentment or report charging the witness with contempt in refusing to produce the papers and documents called for by the subpoena, and also in refusing to answer the questions above set forth (pp. 7-10).

The presentment or report informed the Court that on June 13, 1905, and prior to the service of the subpoena on the witness, the Assistant United States Attorney, being in attendance before the said Grand Jury (pp. 7-8):

"duly made and presented to it a complaint and charge, in behalf of the United States of America, against the America Tobacco Company, a corporation organized under the laws of New Jersey, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, a corporation organized under the laws of the Kingdom of Great Britain and Ireland, that the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been guilty of a violation of the so-called 'Sherman' or 'Anti-Trust' Act, being 'An act to protect trade and commerce against unlawful restraints and monopolies,' 26 Statutes, 209, 1 Supp.; Revised Statutes, 762, and following, and the acts amendatory thereof and supplementary thereto, and chapter 735 of the Laws of 1903, approved February 25, 1903, in the following particulars, to wit:

(1.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, entered into, and have ever since been engaged, within the Southern District of New York and throughout the United States, in carrying out the terms of a contract in restraint of trade and commerce among the several States of the United States in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(2.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, entered into, and have ever since been engaged, within the Southern District of New York and throughout the United States, in carrying out the terms of a contract in restraint of trade and commerce between this country and foreign nations, particularly the Kingdom of Great Britain and its colonies and dependencies, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(3.) In that on or about the 27th day of September, 1902, and continuously since that day, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been engaged, within the southern district of New York and throughout the United States, in an attempt to monopolize the trade and commerce, among the several States, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(4.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, did combine and conspire, and ever since that day, within the southern district of New York, and throughout the United States, they have combined and conspired, and have been engaged in carrying out a combination and conspiracy, with each other, and with other persons and corporations, to monopolize the trade and commerce among the several States, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(5.) In that ever since on or about the 27th day of September, 1902, the said The American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been engaged within the southern district of New York, and throughout the United States, in an attempt to monopolize, and have also during said time and

in said places combined and conspired, and have been engaged in carrying out, a combination and conspiracy with each other, and with other persons and corporations, to monopolize the trade and commerce between this country and foreign nations, particularly the Kingdom of Great Britain and its colonies and dependencies, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes."

It further set forth that the assistant district attorney "acted for the said grand jury and at its request in the investigation of said charges;" that "the said documents and each of them are material to the investigation being conducted by the said grand jury of the charge and complaint submitted to it as aforesaid" (p. 9); that "each of the questions propounded to said witness as aforesaid * * * was pertinent to the said complaint and charge then pending before the said grand jury, and was material thereto (p. 10).

It further informed the Court how the Assistant United States Attorney had, in the Grand Jury room, characterized the so-called "suit or proceeding," and how he had offered and assured the petitioner immunity and exemption for any testimony he might give (p. 9).

On the facts thus set forth the Grand Jury asked that such proceedings be had as were, "in the premises, in accordance with law" (p. 10).

The Grand Jury, the counsel for the government and the witness having repaired to the court room and appeared before the Circuit Judge, and the presentment or report of the Grand Jury having been filed (*Id.*, p. 27), the Court thereupon made the following order (*Id.*, p. 28):

"The witness is hereby directed to answer the questions as propounded by the Grand Jury, and forthwith to produce the papers and documents called for in the subpoena."

The Grand Jury, the counsel for the government and the witness then returned to the Grand Jury room, and the latter's examination was resumed.

The questions were again put to him and he repeated his refusal to answer them, giving his reasons as before. In like manner, and upon the grounds previously stated by him, he refused to produce the books and papers called for by the subpoena *duces tecum* (pp. 28-29).

A second report or presentment setting forth what occurred at this time was thereupon submitted to the Court by the Grand Jury (pp. 25-27). The petitioner being again present, an order was made adjudging him guilty of contempt, fining him five dollars and directing his commitment to the custody of the marshal until he complied with the order of the Court "by answering the said questions and producing the said papers and documents, or is discharged by due process of law" (pp. 6-7).

The writ was applied for in order to secure a determination as to the legality of the witness' restraint under the commitment issued pursuant to this order, by virtue of which the petitioner was taken into custody by the marshal (pp. 5-6). The application was denied upon the ground that it appeared from the petition itself that the witness was not entitled to the writ (pp. 29-30); and this appeal is from the final order entered upon this decision (pp. 32-34).

Specification of Errors.

The appellant contends that the Circuit Court erred in denying his application (1st Assignment, p. 35), in holding that it appeared from the petition itself that he was not entitled to the writ (2d Assignment, *Id.*), and in holding that he was lawfully held in custody under the commitment (3d Assignment, *Id.*). Of the other errors specifically assigned

(pp. 35-38) the appellant particularly relies upon the following:

(a.) Section 1 of the Act of February 25, 1903, does not give the appellant immunity from prosecution, for or on account of the transactions, matters or things concerning which he was directed to testify and produce evidence before the Grand Jury, the so-called investigation herein not being a "proceeding, suit or prosecution" under either of the acts referred to in the Act of February 25, 1903; consequently the appellant was within the legitimate exercise of his right under the Fifth Amendment when he refused to testify or produce evidence before the Grand Jury on the ground that by so doing he might have criminated himself (7th and 9th Assignments, pp. 35-36).

(b.) The order directing the appellant to testify and produce documentary evidence before the Grand Jury was, in effect, an attempt to compel the American Tobacco Company, to give evidence against itself in a criminal case in violation of its rights and privileges under the Fifth Amendment which would have been violated by the appellant's compulsory examination before the Grand Jury (10th and 11th Assignments, p. 36).

(c.) The Act of February 25, 1903, is unconstitutional and void in that it infringes the reserved power of the States to prosecute or pardon offenders against their own laws (13th, 14th, 15th and 16th Assignments, *Id.*).

(d.) The order of May 5th, directing the appellant to forthwith produce the papers called for by the subpoena *duces tecum* was made in violation of the Fourth Amendment, being in effect, a warrant to search for and seize the papers mentioned in the subpoena *duces tecum*, and not being issued upon probable cause, or supported by oath or affirmation, or particularly describing the place to be searched or

the things to be seized (18th and 19th Assignments, *Id.*, p. 37).

(e.) The papers mentioned in the subpoena *duces tecum* being the property of the MacAndrews & Forbes Company and in the appellant's custody solely by reason of his official relations toward that company, the compulsion of said subpoena, and of the order that he produced such papers would, if effective, have amounted to an unreasonable search for and seizure of the papers and effects of the corporation, which it was the appellant's duty as such officer and custodian to protect by all lawful means (20th to 23d assignments, *Id.*).

Brief of the Argument.

The facts do not differ in any material way from those involved in *Hale v. Henkel* (No. 340), except

(1.) That where in the *Hale* case there was no pretense of any pending charge before the grand jury, here the reports of the grand jury set forth that one of the Assistant United States Attorneys "duly made and presented" to that body what is described as a "complaint and charge" against the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited; and

(2.) That the subpoena *duces tecum* here is not of the drag net character issued in the *Hale* case, but calls for certain definitely described documents.

Regardless of these differences, our argument in the *Hale* case applies with full force to the facts in this case, so far as it is addressed to the following propositions, which are also presented by this appeal, viz.:

(a.) That a grand jury inquiry is not a "proceeding, suit or prosecution" within the meaning of the act of February 25th, 1903 (*Hale* brief; Fourth Point).

(b.) That that act is unconstitutional and void in that it impairs the reserved right of the States in respect to the administration of public justice (*Hale* brief; Fifth Point); and

(c.) That the subpoena and the order of the Circuit Court directing compliance therewith were issued and made in violation of the rights of the American Tobacco Company under the Fourth Amendment (*Hale* brief; Sixth Point, except so far as the argument there is addressed to the drag-net character of the subpoena and the absence of a specific charge pending against a specified person).

We refrain from repeating in this brief the arguments so advanced in the *Hale* case upon the three propositions above enumerated.

In the Sixth Point of the *Hale* brief the proposition was fully argued that a subpoena *duces tecum*, under which it is attempted to compel an officer of a corporation to produce from the possession of the corporation a private paper of a corporation for the avowed purpose of criminating the corporation, is a violation of the constitutional rights of the corporation under the Fourth Amendment, however definite may be the description of the paper.

Respectfully submitted,

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